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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 356

MOTOR FREIGHT EXPRESS, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court, entered February 17, 1954, be affirmed.[1]

This is a direct appeal from a judgment of a three-judge district court convened pursuant to 28

[1] A timely motion for rehearing was denied on May 26, 1954.

U. S. C. 2284, 2325. The judgment dismisses a complaint which sought to set aside an order of the Interstate Commerce Commission. The agency order in question amended a motor carrier's "grandfather" certificate to authorize the carrier to serve certain additional intermediate points on its routes. Appellants are competing carriers.

The facts are as follows:

Branch Motor Express Company ("Branch") held an amended certificate, issued to it in grandfather proceedings under Sections 206 (a) of the Interstate Commerce Act, which authorized it to engage in common carriage over 42 routes in the States of New York, New Jersey, Pennsylvania and Maryland. The certificate listed 328 intermediate points which Branch could serve. There were 102 additional intermediate points on the routes which the certificate did not specifically authorize Branch to serve.

In 1950 the Commission, in response to Branch's petition for "clarification" of its certificate, reopened the grandfather proceedings to determine, *inter alia*, whether Branch should be authorized to serve the additional intermediate points. After hearing, the Commission (Division 5) held that Branch's certificate did not reflect all of the carrier's operating rights, and that the certificate should be amended to authorize Branch to serve all intermediate points. One effect of this amendment was to authorize Branch to serve York and Lancaster, Pennsylvania, on its Baltimore-Reading di-

rect route.[2] Appellants challenge the grant of authority to serve these two intermediate points.

The Commission held that although the "general testimony" of Branch's witnesses as to the points served during the grandfather period was "too indefinite" to establish grandfather rights with respect to any of the intermediate points, a grandfather applicant is not required to show service at every intermediate point in order to obtain authority to serve all intermediate points on a regular route. "If a sufficient number of intermediate points have been served," the Commission stated, "authority to serve all intermediate points should be granted." The Commission pointed out that Branch's outstanding certificate authorized it to serve 328 (or 76%) of the 430 intermediate points on its routes; that the carrier had introduced additional specific evidence to show that during the grandfather period and continuously thereafter it has served some 17 additional points[3] (an additional 4%); and that its Baltimore-Reading route already covered "all principal intermediate points" with the exception of York, Lancaster and one other town. The Commission also noted that Branch had originally applied for grandfather authority to serve all intermediate points on its

[2] In addition to a Baltimore-Reading route, Branch had Philadelphia-Lancaster and Reading-Lancaster routes. The carrier's certificate did not name York and Lancaster as intermediate points on the Baltimore-Reading route but it did name them as through or junction points.

[3] This included a showing of indirect service to York from Baltimore through Philadelphia.

routes; that it had believed that it was entitled to serve York and Lancaster until its authority to do so was questioned in 1949; and that a flood, which destroyed all of the company's records in 1944, left it without documentary proof of the full extent of its actual service during the grandfather period.

The Commission concluded that its findings in the prior grandfather proceedings respecting Branch's right to serve intermediate points were "too restricted" and that, in the light of those findings and the evidence of Branch's service of additional intermediate points on and since the critical date, Branch was entitled to an amended grandfather certificate authorizing it to serve all intermediate points.[4]

On appeal, the district court unanimously upheld the Commission's order. The court (*per* Staley, Circuit Judge) rejected appellants' argument that the Commission could authorize Branch to serve York and Lancaster on its Baltimore-Reading route only if it found unequivocal proof that Branch had performed such service during the grandfather period. The court held that the Commission could draw the "logical inference" that a carrier which had operated over a route for a long time and had shown service at the majority of the

[4] After the Commission's decision in the instant case, the Commission discontinued proceedings on a complaint by Branch's competitors that Branch had served York directly from Baltimore without certificate authority. The Commission held that although the shipments had been unauthorized, the amendment of the certificate in the instant case made a cease-and-desist order unnecessary.

intermediate points had served all intermediate points. It pointed out that the loss of Branch's records in a 1944 flood had precluded it from producing documentary evidence of shipments before that date, and that the Commission had not found that Branch had failed to serve York and Lancaster, but only that the direct evidence was too indefinite to establish grandfather shipments to those points. The court stated that there was an "obviously sufficient rational connection between what the Commission found to have been proved and what it inferred" to bring the case within the settled rule that the specification of the precise points to be served is a matter for the Commission's expert judgment.

1. Contrary to appellants' contention (Jurisdictional Statement pp. 11-12), the questions which this appeal presents are neither novel nor important. The Commission, in correcting Branch's certificate to include all the operating rights which Branch should have received in the original grandfather proceedings, did not enunciate any new principle. It simply followed its settled construction of the Act—a construction which has received the full approval of this Court.

As this Court has held, Section 206 (a) (the grandfather provision) "does not necessarily restrict future operations to the precise points or areas already served." *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 21. The Act requires only a "substantial parity" between future operations and those during the grandfather period, *id.*,

p. 22, and the "specification of localities which may be serviced has been entrusted by the Congress to the Commission." *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 480. Moreover, "[p]rior operations to several points in a region may * * * justify the Commission in authorizing service throughout the whole region," and the "precise geographical pattern for future operations is the product of an expert judgment based [*inter alia*] on the substantiality of the evidence as to prior operations * * *." *Howard Hall Co.* v. *United States*, 315 U. S. 495, 498.

Consistent with these decisions, the Commission, in its administration of Part II of the Interstate Commerce Act, has repeatedly given a carrier grandfather authority to serve *all* intermediate points upon a showing that it had served a substantial number of such points. *Nevitt Common Carrier Application*, 4 M. C. C. 298, 299-300 (1937); *Consolidated Freight Lines, Inc., Common Carrier Application*, 11 M. C. C. 131, 136 (1939); *Knaus Common Carrier Application*, 20 M. C. C. 669, 671 (1939); *Los Angeles-Seattle Motor Express, Inc., Common Carrier Application*, 24 M. C. C. 141, 145 (1940); *Richards Common Carrier Application*, 27 M. C. C. 489, 494 (1941); *Tarbet Common Carrier Application*, 31 M. C. C. 63, 66-67 (1941); *Riss & Co. Common Carrier Application*, 44 M. C. C. 704, 706 (1945). In *Chicago, St. P., M. and O. Ry. Co.* v. *United States*, 50 F. Supp. 249 (D. Minn.), affirmed, 322 U. S. 1, this Court upheld a grandfather certificate in which the Commission authorized a

motor carrier to serve a number of intermediate points on its routes without any showing that it had served all of them. Cf. *Byers Transp. Co.* v. *United States*, 49 F. Supp. 828, 830 (W. D. Mo.).

Thus, a showing in the original grandfather proceedings that Branch had served all but three of the principal intermediate points on the Baltimore-Reading route would have justified authority to serve all intermediate points. Certainly the Commission is not precluded from correcting a certificate to make it reflect the full measure of the operating rights which the carrier was entitled to receive in the grandfather proceedings but which, through oversight or inadvertence, the Commission failed to grant. Cf. *Baldwin* v. *Milling Co.*, 307 U. S. 478, 484.[5]

2. Nor is there any substance to appellants' contention (Jurisdictional Statement, p. 13) that the Commission was barred from correcting the certificate because of Branch's laches. Although the certificate had been issued several years before the present proceedings, it appears that no question as to Branch's authority to serve York and Lancaster was raised until 1949 and, as the district court

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[5] Apart from the fact that the Commission would have been justified in making a more extended grant in the earlier grandfather proceeding, it appears that Branch, in the supplementary proceeding, might have been able to make a more detailed showing as to service of points originally unnamed had it not been for the destruction of its records by flood. See district court opinion, Jurisdictional Statement, p. 28. The Commission could properly take this circumstance into account. *Id.*, pp. 28-30.

pointed out, "Branch's clarification petition was filed shortly after its operating rights were questioned." The district court correctly concluded that Branch could not be charged with laches since "[o]ne can hardly be said to have delayed unreasonably in acquiring rights which he justifiably believed he had acquired years ago." In any event, no claim is made that appellants have relied to their prejudice upon asserted lack of authority by Branch to serve York and Lancaster, and there are no equitable reasons why the mere passage of time should preclude the Commission from correcting a defective certificate.

3. There is no merit to appellants' contention (Jurisdictional Statement, p. 15) that the decision below is in "substantial conflict" with *Watson Bros. Transp. Co.* v. *United States*, 59 F. Supp. 762 (D. Neb.). In the *Watson* case, the district court upheld a Commission order denying grandfather authority to serve certain intermediate points on the ground that there had been no showing that there had been "any substantial operation to or from the considered points * * *" during the grandfather period (p. 770). The court held (pp. 773, 779) that evidence that there had been substantial service to the points *after* the grandfather date did not establish any right to grandfather authority. In the instant case, on the other hand, the correction of the certificate was predicated upon the conclusion that evidence as to the over-all character of operations *during* the grandfather period

justified a grant of authority to serve all intermediate points on the route.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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OCTOBER, 1954.

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